TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1195.

THE UNITED STATES EX REL. R. MASON LISLE, PLAINTIFF IN ERROR,

vs.

JOHN R. LYNCH, FOURTH AUDITOR, AND BENJAMIN F. GILKESON, SECOND COMPTROLLER, OF THE TREASURY OF THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JUNE 21, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 10, 1890.

1 *Petition for Mandamus. Filed Dec. 6, 1889.*

Supreme Court of the District of Columbia.

U. S. *ex Rel.* R. MASON LISLE, Lieut. U. S. Navy (Retired),
vs.
JOHN R. LYNCH (Fourth Auditor) and B. F. GILKESON (Second Comptroller) of the Treasury of the United States, and Their Successors.

At Law.
No. 30159.

Petition for a writ of mandamus.

1. The petitioner avers that he was an officer of the navy from March 19, 1872, to May 6, 1872, of the rank of lieutenant; that on March 19, 1872, he was ordered by his superior officer to proceed from Philadelphia, Pa., via New York and the Pacific mail steamer from New York, on March 30th, to Aspinwall, across the Isthmus of Panama, and thence to the navy yard, Mare Island, Cal., and report for duty on board the U. S. S. "Lackawana;" that he proceeded by the said route, in accordance with said orders, completing the
2 journey on May 6th, 1872.

2. That in obeying the said orders he traveled 6,222 miles, viz., from Philadelphia to New York, 88 miles; from New York to Mare Island, 6,134 miles. For his traveling expenses from Philadelphia to New York he was paid $8.80, being at the rate of ten cents per mile; but for his traveling expenses from New York to Mare Island he was only credited with mileage for the distance between the extreme points by the overland route—a route he was not ordered to travel and did not travel—3,248 miles, at ten cents per mile, amounting to $324.80, whereas, by the law in force at the time of the travel (act of March 3, 1835, 4 Stat. L., 755), he should have been credited with mileage for the distance actually traveled, 6,134 miles, at ten cents per mile, amounting to $613.40; thus the petitioner has received $288.60 less than he should have received under the said act of Congress, which was the act which governed the compen-
3 sation to be paid for mileage at that time.

3. That the respondents have refused and still do continue to refuse to pay the petitioner or to credit him with the sum of $288.60, that being the amount remaining unpaid on the said travel under the said act of Congress.

4th. That there is no application of the statute of limitations, for the claim was adjusted and disallowed by Comptroller Maynard on Feb. 2, 1887, the said disallowance being a clear violation of the said act of Congress.

Therefore, the said travel having been performed, the distance having been correctly computed, the application of the said act of Congress to the said travel—under the acts of Congress, Rev. Stat. (1878), sections 273, 277, prescribing the duties of the accounting

officers—is a mere ministerial duty, the exercise of a discretion being invalid under the said sections.

Wherefore the petitioner prays that a writ of mandamus
4 may be issued to the said respondents, commanding them to audit the petitioner's account for the said travel and allow the same, and to issue a warrant in the manner it is the custom of the Treasury to issue warrants for the payment of mileage under the said act of Congress of March 3, 1835, the same being mandatory upon the accounting officers.

And the petitioner will ever pray, etc., etc., etc.

R. MASON LISLE.

CITY AND COUNTY OF PHILADELPHIA, } ss:
State of Pennsylvania, }

Before me, the subscriber, Edward H. Cloud, a notary public for the Commonwealth of Pennsylvania, residing at Philadelphia, personally appeared R. Mason Lisle, who, being duly sworn according to law, did declare and say that the facts set forth in the above petition are true, to the best of his knowledge and belief.

R. MASON LISLE.

5 Witness my hand and seal this third day of December, A. D. 1889.

[SEAL.] EDW'D H. CLOUD,
Notary Public.

Rule to Show Cause. Issued Dec. 6, 1889.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* R. MASON LISLE, Lieut. U. S. Navy (Retired),
vs.
JOHN R. LYNCH, 4th Auditor, and B. F. GILKESON, 2d Comptroller, of the Treasury of the U. S. } At Law. No. 30159.

Upon consideration of the petition for mandamus filed in the above-entitled cause, it is, this 6th day of December, A. D. 1889, ordered that the defendants show cause on Monday, the 16th day of December, A. D. 1889, at ten o'clock in the morning, before the court in general term, why the said writ of mandamus should not issue as prayed; and it is further ordered that a copy of
6 this order be served on the defendants on or before the 9th day of December, A. D. 1889.

E. F. BINGHAM,
Chief Justice.

Marshal's Return.

Served copy of the within rule and also copy of the petition in

this cause on John R. Lynch, 4th Auditor, & B. F. Gilkeson, 2d Comptroller, of the Treasury U. S., December 6th, 1889.

D. M. RANSDELL, *Marshal.*

Order for Appearance for Respondents Filed Dec. 11, 1889.

In the Supreme Court of the District of Columbia, the 11th day of December, 1889.

THE U. S. *ex Rel.* R. MASON LISLE
vs.
JOHN R. LYNCH and B. F. GILKESON. } At Law. 30159.

The clerk of said court will please enter my appearance for the respondents herein.

JNO. BLAIR HOGE,
Attorneys for Respondents.

7 *Court Proceedings.*

MONDAY, *October* 7, 1889.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning first Monday, October 7th, 1889.

Present, presiding: Chief Justice Bingham & justices.

* * * * * * *

FRIDAY, *December* 13, 1889.

Session resumed pursuant to adjournment.

Present: Justices Hagner & James.

THE UNITED STATES *ex Rel.* R. MASON LISLE
vs.
JOHN R. LYNCH and B. F. GILKESON, Def'ts. } At Law. 30159.

On motion of John Blair Hoge, Esq., attorney for the respondents, the relator, in his own behalf, assenting thereto, it is by the court, this 13th day of December, A. D. 1889, ordered that the
8 time fixed for answering the rule heretofore issued herein be, and the same is hereby, enlarged to and including the 19th instant.

By the court:

A. B. HAGNER.

Stipulation of Counsel Curing Defects in Caption of Petition and Waiving an Alternative Writ of Mandamus Filed Dec. 19, 1889.

In the Supreme Court of the District of Columbia.

U. S. *ex Rel.* R. MASON LISLE
vs.
JOHN R. LYNCH, Fourth Auditor, and B. F. GILKESON, Second Comptroller, of the Treasury of the United States. } At Law. No. 30159.

It is hereby stipulated and agreed by and between the relator, acting in his own behalf, and the undersigned, attorney for the respondents, as follows:

1st. That the United States of America bring this suit on the relation of the above-named relator.

9 2d. That the respondent Gilkeson'- given name is Benjamin.

3d. That the petition filed herein and the rule to show cause issued thereon shall be considered and treated as an alternative writ of mandamus, to which the respondents may make answer or demur, as they may be advised.

R. MASON LISLE,
Relator, Acting in His Own Person.
JNO. BLAIR HOGE,
Attorney for Respondents.

City of Washington, Dec'r 14, 1889.

Demurrer to Alternative Writ of Mandamus. Filed Dec. 19, 1889.

In the Supreme Court of the District of Columbia. In the General Term, in the First Instance.

THE UNITED STATES OF AMERICA on the Relation of R. MASON LISLE
vs.
JOHN R. LYNCH, Fourth Auditor, and BENJAMIN F. GILKESON, Second Comptroller, of the Treasury. } At Law. No. 30159.

10 The respondents say that the alternative writ of mandamus issued herein is bad in substance and does not set forth such a case as they ought to be required to answer.

JNO. BLAIR HOGE,
Attorney for Respondents.

NOTE.—Among the matters of law relied upon and to be argued in support of the above demurrer are—

1st. That mandamus will not lie against an officer of the Treasury Department for refusal to allow and pay a claim against the United States, for however obviously without legal justification his refusal may be a mandamus against him to compel such allowance

and payment is none the less in effect a suit against the United States.

2d. That it appearing that the relator's claim had been disallowed by the predecessor in office of the respondent Gilkeson (to wit, Second Comptroller Maynard), and there being no allegation of the production before the respondents of new-discovered material evidence, or that the original disallowance involved errors of computation, it is not competent for these respondents to reopen the
11 settlement involving such disallowance.

Joinder in Demurrer. Filed Dec. 21, 1889.

In the Supreme Court of the District of Columbia. In the General Term, in the First Instance.

THE UNITED STATES OF AMERICA *ex Rel.* R. MASON LISLE
vs.
JOHN R. LYNCH, Fourth Auditor, & BENJAMIN F. GILKESON, Second Comptroller, of the Treasury.
} At Law. No. 30159.

The relator says that the alternative writ of mandamus issued herein is good in substance.

R. MASON LISLE,
Relator, Appearing in His Own Person.

Filed Dec. 21st, 1889.

12 *Motion to Advance on Argument List. Filed Dec.* 21, 1889.

In the Supreme Court of the District of Columbia. In General Term.

LISLE, etc., etc.,
vs.
LYNCH, etc., etc., and GILKESON, etc., etc., of the Treasury.
} At Law. No. 30159.

Motion to advance.

The relator moves the court to advance the above case on the argument list and to hear argument on the same at the earliest date practicable, for the reason that unless the case is advanced the term of office of respondents might expire before the case is reached on the regular call in the final hearing of the case.

U. S. *ex rel.* McLeod *vs.* John Sherman, 98 U. S. R., 505, & Phillips, U. S. S. C. Prac., 291.

R. MASON LISLE,
Relator, Appearing in Pro. Per.

13 *Court Proceedings.*

MONDAY, *April 7th*, 1890.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning the first Monday, April 7th, 1890.

Present, presiding: Justices Hagner and James; Justice Cox absent, holding equity court, and chief justice holding criminal court.

* * * * * * *

MONDAY, *April* 21, 1890.

Session resumed pursuant to adjournment.
Present, presiding: Justices Hagner, Cox, and James.

UNITED STATES *ex Rel.* R. MASON LISLE *vs.* Fourth Auditor U. S. Treasury, JOHN R. LYNCH; Second Comptroller U. S. Treasury, B. F. GILKESON.	On Petition for Mandamus. At Law. No. 30159.

14 The matter of this application coming on to be heard, and having been argued and considered by the court, it is, this 21st day of April, 1890, by the court here adjudged and ordered that the prayer of the petition for mandamus be, and the same is, refused, and the said petition be, and the same is, dismissed.

By the court:

A. B. HAGNER.

Petition for Writ of Error, &c. Filed May 31, 1890.

Supreme Court of the District of Columbia. In General Term.

U. S. *ex Rel.* R. MASON LISLE, Lieut. U. S. Navy (Retired), *vs.* JOHN R. LYNCH (Fourth Auditor) and B. F. GILKESON (Second Comptroller) of the Treasury of the United States, and Their Successors.	At Law. No. 30159.

To the Honorable E. F. Bingham, chief justice of the said court:

15 The petition of R. Mason Lisle respectfully shows—

That in this court a final judgment was rendered, by which the relator's petition for a mandamus was dismissed. The full record of the cause, duly certified by the clerk thereof, is annexed and herewith presented, and from which it will appear that in the said cause was drawn in question the validity of an authority exercised under the United States, within the meaning of the act of Congress of March 3, 1885 (23 Stat. L., 443).

And your petitioner now assigns the following errors in the said record, to wit:

Assignment of Errors.

(1.) The court erred in dismissing the petition and in declining to issue the writ of mandamus.

(2.) The court erred in sustaining the demurrer.

(3.) The court erred in not deciding that the duty of the respondents under the act of Congress of March 3, 1835 (4 Stat. L., 755),
was ministerial, and that the exercise of a discretionary duty
16 was an invalid exercise of an authority under the United
States, the Revised Statutes, sections 273 and 277, prescribing the duties of the respondents in the premises.

Wherefore your petitioner prays the allowance of a writ of error to the said court removing the said case to the Supreme Court of the United States.

And your petitioner will ever pray, etc., etc.

R. MASON LISLE.

A writ of error is allowed and citation will be issued on filing a bond in the sum of two hundred dollars.

E. F. BINGHAM,
Chief Justice Supreme Court of the District of Columbia.

(Endorsed:) No. 30159. At Law. S. C. of the Dist. of Columbia. Lisle *vs.* Lynch *et al.* Petition for writ of error. Assignment of errors and allowance of writ.

17 *Court Proceedings.*

SATURDAY, *May* 31, 1890.

Session resumed pursuant to adjournment.

Present, presiding: Justices Hagner, Cox, and James.

U. S. *ex Rel.* R. MASON LISLE, Lieut. U. S. Navy,
vs.
4th Auditor U. S. Treasury, JOHN R. LYNCH, & 2d Comptroller U. S. Treasury, B. F. GILKESON.
} At Law. No. 30159.

This cause coming on to be considered upon the petition of relator, this day filed, praying allowance of a writ of error to the Supreme Court of the United States, for the reasons stated in his assignment of errors, it is by the court ordered thereon that a writ of error is allowed, and a citation will be issued on filing a bond in the sum of two hundred dollars.

(Signed,) E. F. BINGHAM,
Chief Justice, &c.

18 *Bond for Writ of Error. Filed June 6, 1890.*

In the Supreme Court of the District of Columbia, the fifth day of June, 1890.

THE UNITED STATES OF AMERICA *ex Rel.* R. MASON LISLE
vs.
JOHN R. LYNCH, 4th Auditor, and B. F. GILKESON, 2d Comptroller of the Treasury of the United States, & Their Successors.

In Error. At Law. No. 30159.

Know all men by these presents that we, R. Mason Lisle and James Large, are bound unto the above-named John R. Lynch and B. F. Gilkeson in the sum of two hundred dollars ($200.00), to be paid to the said John B. Lynch and B. F. Gilkeson, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this fifth day of June, 1890.

19 Whereas the above-named R. Mason Lisle hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in above suit by the supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that the above-named R. Mason Lisle shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to made good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

R. MASON LISLE. [SEAL.]
JAMES LARGE. [SEAL.]

Sealed and delivered in presence of—

J. W. FASSITT,
THEODORE FASSITT.

I hereby certify that the within-named R. Mason Lisle and James Large are personally known to me, and that each of them is fully responsible for the amount of the within bond.

June 5, '90.

SAMUEL BELL, [SEAL.]
U. S. Comm'r.

20 Approved June 6th, 1890.

E. F. BINGHAM,
Chief Justice.

21 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between The United States of America *ex rel.* R. Mason Lisle, plaintiff, and John R. Lynch, 4th auditor, and Benjamin F. Gilkeson, 2d comptroller, of the Treasury of the United States, defendants, being No. 30159 at law, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of June, in the year of our Lord 1890, and of the Independence of the United States the one hundred and fourteenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

22 *Citation to the Supreme Court of the United States.*

The United States of America to John R. Lynch, 4th Auditor, and Benjamin F. Gilkeson, 2d Comptroller, United States Treasury, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States *ex rel.* R. Mason Lisle is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety.

E. F. BINGHAM,
Chief Justice.

Service acknowledged on this 13th day of June, in the year of our Lord one thousand eight hundred and ninety.

JNO. BLAIR HOGE,
U. S. Att'y for D. C., for Respondents.

23 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 13 day of June, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 13 day of June, 1890.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 13 day of June, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record. The United States *ex rel.* R. Mason Lisle *vs.* John R. Lynch, 4th Auditor, and Benj. F. Gilkeson, 2d Comptroller, U. S. Treasury.

Endorsed on cover: District Columbia supreme court. No. 1195. The United States *ex rel.* R. Mason Lisle, plaintiff in error, *vs.* John R. Lynch, 4th Auditor, and Benjamin F. Gilkeson, 2nd Comptroller, of the Treasury of the United States. Filed June 21, 1890.

JAMES H. MCKENNEY
CLERK.

Supreme Court of the United States.

October Term, 1890. No. 1195.

UNITED STATES *ex rel.* R. MASON LISLE,
Plaintiff in Error,

vs.

JOHN R. LYNCH AND B. F. GILKESON,
Defendants in Error.

Motion to Advance.

Now comes the plaintiff in error, and moves the Court to advance the above cause for hearing, on ~~October the twenty-second~~ December the 11th, or thereafter, on the earliest day practicable.

The cause is a petition for a writ of mandamus against the defendants in error, accounting officers of the Treasury, and the motion is made, for the reason that the said accounting officers may be out of office before the case will be reached on the call of the regular docket. *United States ex rel. McLeod* vs. *Sherman*, 98 U. S. R., 505, Phillips, U. S. [illegible]. C. Prac., 291.

It has already happened that the plaintiff in error in the same cause obtained a writ of error, but as the accounting officers had gone out of office, he has been forced to begin the cause *de novo*.

To avoid a similar contingency, the plaintiff in error respectfully prays that his motion be allowed.

R. MASON LISLE,
Plaintiff in Error.

(Q 53)

No. 1105

Supreme Court of the Uni

THE UNITED STATES *Ex Rel.* R.

vs.

JOHN R. [illegible], Fourth Auditor, and [illegible]
F. GILLESPIE, Second Comptroller [illegible]
ury of the United States, and [illegible]

The Argument of the Plaintiff in [illegible]

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R. MASON LISLE
J. EDWARD CAMPBELL
For Plaintiff in Error

THE ARGUMENT OF THE PLAINTIFF IN ERROR.

Statement of the Case.

(1.) The issue is a demurrer to a petition for a writ of mandamus. The plaintiff in error, the relator below, alleges in his petition (Record, p. 1), and the facts are admitted by the demurrer of the defendants in error, the respondents below, that the petitioner as an officer of the Navy traveled by order of his superior officer from Philadelphia by way of New York, Aspinwall, the Isthmus of Panama and thence to Mare Island, California; that the Act of March 3, 1835, which regulated the compensation for the said travel, provided "that ten cents per mile shall be allowed"; that the accounting officers had allowed the mileage at the proper rate, to wit, ten cents per mile, but, contrary to the Act, they allowed the mileage only for the distance between the extreme points by the *overland* route—a route, it will be perceived, the petitioner was not ordered to take and over which he did not travel. He was therefore paid $288.60 less than he should have received for the route he was ordered to take and for the distance he actually traveled.

The petition further alleges that the application of the said Act of March 3, 1835[1], under the Acts of Congress,

(1) 4 Stat. L., 757, Sec.: "It is hereby expressly declared that the yearly allowance provided in this Act is all the pay, compensation and allowance that shall be received under any circumstance whatever, by any such officer or person, except for traveling expenses, when under orders, for which ten cents per mile shall be allowed."

Rev. Stat. (1878), Sections 277[1] and 278[2] prescribing the duties of the accounting officers, is a mere ministerial duty, the exercise of a discretion being invalid.

And the prayer of the petition was that a writ of mandamus may be issued, commanding the defendants in error to audit the account for the said travel, and allow the same and to issue a warrant, in the manner it is the custom of the Treasury to issue warrants for the payment of mileage, under the said Act of Congress of March 3, 1885[3], the same being mandatory upon the accounting officers.

The defendants in error, the respondents below, demurred (Record, p. 4), the matters of law relied upon, will be stated later on, in the argument (pp. 8, 10).

The Court, after hearing, dismissed the petition, no opinion being filed (Record, p. 6).

And the case has been brought to this Court, under a writ of error, under the act of March 3, 1885 (23 Stat. L., 443), which, in the second section, provides that "the preceding section shall not apply to any case * * * in which is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

(2.) Assignment of Errors.

1. The Court erred in dismissing the petition and in declining to issue the writ of mandamus.

2. The Court erred in sustaining the demurrer.

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(1) *"The Fourth Auditor shall receive and examine all accounts accruing in the Navy Department, and after examination of* SUCH *accounts, he shall certify the balances and shall transmit such accounts with the vouchers and certificate to the Second Comptroller for his decision thereon."*

(2) The Second Comptroller shall (1) examine all accounts settled by the Fourth Auditor and certify the balances arising thereon to the Secretary of the Navy (2) countersign all warrants drawn by the Secretary of the Navy which shall be warranted by law.

(3) Page 1, Note 1.

8. The Court erred in not deciding that the duty of the respondents, under the act of Congress of March 3, 1885 (4 Stat. L., 755),[1] was ministerial, and that the exercise of a discretionary duty was an invalid exercise of an authority under the United States, the Revised Statutes, Sections 278[2] and 277,[3] prescribing the duties of the respondents in the premises.

Argument.

Before commencing the argument, a few words of preface will not be inappropriate. It is submitted that this cause presents a really great question of governmental law. The amount involved is trifling, but the principle is of the utmost importance. It does not involve the political powers of the officers of the State, which, of course, cannot be controlled by mandamus, but it deals with the action of executive officers of the government, wherein the private property right of an individual is at stake. The Court below held, in dismissing the petition, that the accounting officers of the Treasury are vested with a *discretion* in the construction of a mandatory act of Congress, which act confers upon an individual a vested right; if this be sound then it follows that the sub-division of duties, into ministerial and discretionary, is destroyed. But this cannot be correct, for it would actually make the office superior to the mandate of the act; on the contrary, the true principle must be that the accounting officers are conduit pipes for carrying to its completion the act of Congress—whatever it may be.

If the Act is a mandatory one, for the accounting officers to assume a discretionary power of construction and thereby violate the mandate of the Act, is clearly an autocratic assumption of power, which has no place in our

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(1) Page 1, Note 1.

(2 and 3) Page 2, Notes 1 and 2.

system of government, and naturally one turns to the judiciary for protection. In America, the law is supreme, and no governmental officer is superior to it. In this sense, the writ of Mandamus is only inferior to the writ of Habeas Corpus, to the extent that property rights are inferior to the liberty of the person; but as a matter of fact, the writs are of nearly equal importance, for as said by a member of this Court; "it should never be forgotten that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe."

The case here presented is one of first impression in this Court; it involves, in a slightly more complicated manner than usual, the distinction between the ministerial and the discretionary duty, as will appear later on, when the matters of law relied upon in the demurrer, are under discussion. But just here it may be stated that independently of these special causes of demurrer, the plaintiff in error submits that his case will stand or full, as the duty is ministerial or discretionary.

Before considering this question, it may be well to state here, that it is unnecessary to seek for the meaning of the Mileage Act, because this Court has decided that the Act provided that ten cents per mile should be allowed for each mile traveled.

U. S. v. *Temple*, 105 U. S., 97.

U. S. v. *Graham*, 110 U. S., 219.

(3.) Was the duty ministerial or discretionary?

There is no dispute about the facts: thus, there remains only, the question of law, as to the duty of the accounting officers, under the Act. In a very recent case, not yet regularly reported, *State* v. *Anderson*, 18 Atlantic Rep., 584 (N. J.), the very question presented here was decided, the syllabus having been written by the Court—when

the facts were conceded, but a mistaken view of the law had been taken, mandamus would issue.

"*Ten cents per mile shall be allowed*," creates a ministerial duty in the accounting officers. Neither the judgment of a Court nor of accounting officers can charge the amount. As said by Chief-Justice DRAKE, in the Temple Case, 14 C. Cls., 377, 380: "No officer can claim anything more or other than the law authorizes, nor can the accounting officers of the Treasury Department require him to accept anything less or other than just that," and in *People ex rel. Satterlee* v. *Board of Police*, 75 N. Y., 38, 42, it was held: "There is no principle upon which an individual, appointed or elected to an official position, can be compelled to take less than the statute declared."

The crowning tests of a ministerial duty applicable to this case, are as follows:

1. Is the sum definitely fixed by the Act, so that there can be no exercise of discretion in determining it?

2. Does the Act create a legal right in the beneficiary independently of any action on the part of the accounting officers?

Both of these questions must be answered in the affirmative; the Act provides, "*ten cents per mile shall be allowed*," so that there is no room for discretion, and secondly, the Act itself creates a legal right to ten cents per mile. This was decided in *Rutherford* v. *Greene's heirs*, 2 Wheat., 196, 198, where Chief-Justice MARSHALL delivered the opinion of the Court, and held that an Act: "25,000 *acres of land shall be allotted to General Greene*," created a legal right in the General to have the allotment made, notwithstanding it was to be made in the future.

The error of the accounting officers may have originated from supposing that the act of signing the warrant had something to do with the creation of the legal right; but this belief is erroneous, for, as just shown, in *Rutherford* vs. *Greene's Heirs*, the Act of Congress created the legal right to the land, and making the allotment was

simply an obligatory executive act in due execution of the law, making title to the land.

These two tests of a ministerial duty are almost axiomatic in their application, and it is not necessary to cite authorities to sustain them. Applied to every case, they will distinguish the ministerial from the discretionary duty, thus: *The Kendall Case*, 12 Peters's, 524, does, but the *Decatur Case*, 14 Peters's, 497, does not stand their application. In the former, the Act of Congress authorized the Solicitor-General to fix the amount due; but after this official had determined the amount, the Postmaster-General's duty to pay that amount was ministerial. Why? Because (1) the sum was fixed, and (2) the Act created a legal right in the beneficiary to that fixed sum. The *Decatur Case*, however, lacks both (1) the fixed amount and (2) the legal right to that fixed amount. The *Kendall* case and the *Decatur case* are the leading authorities. Of course there are numerous others, but they need not be quoted, because they are only varying presentations of the same principle, which, to repeat ourselves, is this: Where the Act creates a legal right to a fixed amount, the duty of awarding that amount is ministerial.

There is no appreciable difference between the case of the plaintiff in error and the Kendall case. Thus (1) in the *Kendall case* there was no general law applicable to the case, because it was a disputed claim: hence a special Act was passed; but in the present case a special Act was not required, because the general law—March 3, 1835—ascertained the amount and directed its payment. (2.) In the *Kendall case* the special Act referred to the individuals by name, who were to receive the benefit of it; but in the present case the reference in the Act is specifically to naval officers collectively. (3.) In the *Kendall case*, the fixing the amount by the Solicitor-General was a condition precedent to the vesting of the legal right, and the Postmaster-General had nothing to do with the creation of the legal right. In the present case, the orders for the

travel and the performance of the same—there is no dispute about the facts—were the conditions precedent to the vesting of the legal right to ten cents per mile, and the accounting officers had nothing to do with the creation of the legal right. These are the only points of difference between the Kendall case and the present one, and, of course, these differences can have no effect upon the principle of law applicable to both. There can be no difference in principle, in a ministerial duty whether created by special or by general Act; neither can there be any difference in such duty, by reason of one Act referring to the beneficiaries by name, whilst, in the other Act, they are a specifically indicated class of beneficiaries; neither can there be any difference in the duty, simply because the amount to be paid is fixed differently, in the one case, the Act authorizing the Solicitor-General to fix the amount due, in the other case, the Act itself fixing the amount at ten cents per mile. Surely none of these differences destroy the principle applicable equally to both cases.

In *Mason* v. *Fearson*, 9 How. 249, the Court said: "What a public officer is empowered to do for others, and it is beneficial to them to have done; the law holds he ought to do," and in *People* vs. *Superior Court*, 10 Wend. 291, Chief Justice Savage said: "But where the law has given to parties rights, as growing out of a certain state of facts, there discretion ceases; if the tribunal charged with administering justice commits an error in such a case, its acts must be subject to review." "Salaries due to public officers, when the amount is fixed, and appropriated by law, the drawing of a warrant upon the public treasury for the same is unattended with the exercise of any official discretion and may very properly be coerced by mandamus." High on Extra. Rem. Sec. 105; Wells, Juris. of Courts, etc., 475, 476. In *State, ex rel. Marshall* vs. *Starling*, 18 S. C. 266, it was held: "The claim is for salary and need not be

audited; it is fixed by law and ordered to be paid; it is a ministerial act positively required by law." In *Fowler* v. *Peirce*, 2 Cal. 165, the Court held: "It is the duty of the Comptroller to audit the appellant's account. The nature and amount of the same are ascertained, and the law has fixed the compensation. The Comptroller, whose business, it is to know the law by which he is required to act, has no discretion in such a case. He must audit the account, according to the law in force, and it will be no sufficient answer to a mistake or refusal on his part, to say he acted according to his discretion. The act of auditing an account under circumstances like these, becomes merely ministerial."

It is confidently submitted, that upon principle and by authority, the duty, under the mileage act, is a ministerial duty to allow ten cents per mile. If this be the case, then it is urged that the matters of law, relied upon by the defendants in error, will not change the character of this duty nor prevent the Court from issuing the mandamus.

(4.) We will consider separately, the matters of the law, relied upon in the demurrer.

(*a*)—First Matter of Law relied upon in the Demurrer. [Record p. 4.]

"Mandamus will not lie against an officer of the Treasury for refusal to allow and pay a claim against the United States; for however obviously without legal justification, his refusal may be, a mandamus against him to compel such allowance and payment is none the less in effect than a suit against the United States."

The above statement of the law is correct where the duty is discretionary, but it does not apply where the duty is ministerial, for in the *Kendall* case, the writ of mandamus issued and in *Cunningham* vs. *Macon*, etc. R. R., 109, U. S. 446, 452, the Court, through Mr. Justice Miller, shows that the Kendall case was not a suit against the State.

This question has been thoroughly considered—notably in the various tax cases, thus the following were not suits against the State—*Board of Liquidation* vs. *McComb*, 92 U. S. 531, 541; *U. S.* vs. *Lee*, 106 U. S. 196; *Poindexter* vs. *Greenhow*, 114 U. S. 269; but *Louisiana* vs. *Jumel*, 107 U. S. 711; *Cunningham* vs. *Macon*, etc., R. R., 109 U. S. 446; *Hagood* vs. *Southern*, 117 U. S. 53; *in re Ayres*, 123 U. S. 443, were suits against the State. The principle of these decisions is explained in *Rowlston* vs. *Missouri Fund Commissioners*, 120 U. S. 390, where, in fact, the question was directly decided, and *Louisiana* vs. *Jumel* is distinguished: it is a suit against the State to compel a State officer to do what a statute has prohibited him from doing, but it is not a suit against the State to compel a State officer to do what a statute requires him to do.

Certainly the statute required the accounting officers to pay ten cents per mile, and to enforce this clearly ministerial duty by mandamus, cannot possibly be a suit against the State. It must be remembered that this is not an attempt to extort money from the Government, but it is asking the Court to order to be done what Congress by an Act required to be done. Mr. Justice Matthews, delivering the opinion in *Poindexter* vs. *Greenhow*, 114 U. S., 270, 293, correctly states the principle, wherein he says, that instead of being a suit against the State, "*the plaintiff in error, in fact and in law, is representing her (the State) as he seeks to establish her law, and vindicates her integrity as he maintains his own right.*"

Mr. Justice Bradley, delivering the opinion in *Board of Liquidation* vs. *McComb*, *supra*, shows that mandamus to compel the performance of a ministerial duty is not a suit against the State, and he has been repeatedly followed, both in opinions, as in the cases already stated, and by dissenting Justices,[1] which shows that the Court and dissent-

(1) Field, J., (dissenting), in 107 U. S., 734, 738; Harlan J., (dissenting), 107 U. S., 768, and Bradley, J., (dissenting), 114 U. S., 326.

ing Justices, whatever may have been the cause of dissent, have always held, with absolute consistency, that mandamus to compel the performance of a ministerial duty is *not* a suit against the State. Where the duty is discretionary, as in *United States* vs. *McLean*, 95 U. S., 750, or where it is an attempt to enforce by mandamus a controverted or disputed claim against the United States *a different principle applies and it will be held a suit against the State, as in Guthrie* vs. *United States*, 17 How., 808; *Reeside* vs. *Walker*, 11 How., 272, 290.

(*b*). Second matter of law relied upon in the demurrer [Record, p. 5.]

(2). "It appearing that relator's claim had been disallowed by the predecessor in office of the respondent, Gilkeson, (to wit: Second Comptroller Maynard), and there being no allegation of the production before the respondents of new-discovered material evidence, or that the original disallowance involved errors of computation, it is not competent for these respondents to reopen the settlements involving such disallowance."

First, it should be stated that the claim was disallowed and the settlement closed by the predecessor, under a misconstruction of the law. This is proven by the decision of this Court in *U. S.* vs. *Graham*, 110 U. S. 219, hence the claim was never properly disallowed or never properly closed.

The question of law involved in this demurrer is of very extensive operation—it relates to the power of executive officers over mandatory acts of Congress, and it may be stated as follows: Can an executive officer consider a case closed and thereby decline to carry out a ministerial act of Congress, because his predecessor in office had closed the case, under an erroneous construction of the law? This was decided in the affirmative in the Court below, and the case of *U. S.* vs. *Bank of Metropolis*, 15

Peters's 400–'01, was relied upon. But it is submitted that the defendants in error have totally neglected to observe that in that case, the Act under which the Postmaster General acted, had reference to extra allowances for additional services, and, more than this, the rights of third parties were also involved. The Government claimed a certain amount due from the Bank, the latter "set off" against this demand, a number of notes of a mail contractor, which the "Treasurer" had marked "accepted," the said notes having come into the possession of the Bank as a third party in its discounting business; the Court held that a successor could not disallow a credit which his predecessor had allowed under an Act which vested the latter with a discretionary power of regulating the allowances, unless, as the Court said, new evidence was presented or error in computation had been made. It is not difficult to distinguish the case of the plaintiff in error, wherein the Act is mandatory, and wherein the plaintiff in error is given a legal right, of which it is not possible, he can be deprived, simply by the erroneous construction of the law, by an executive officer.

It is not urged that executive officers can be coerced to overrule a predecessor's rightly exercised discretionary judgment—for this is the *Bank of Metropolis case*; but it is submitted that the Court will act where the duty is ministerial—not of doubtful character and thus capable of construction, but so clearly ministerial that Chief-Justice WAITE, in speaking for the Court, and of this very Act, said, in *U. S.* v. *Graham*, 110 U. S., 219, 221: "But with language clear and precise and with its meaning evident, there is no room for construction and consequently no need of anything to give it aid."

If a clearly ministerial act cannot be carried out by a successor, then the personality of the office is superior to the mandate of the act. Surely one cannot lose a legal right by the passing out of office of one who had nothing

to do with the creation of that right. In the *Kendall Case* the Postmaster General thought that he had a discretion to exercise, and he, therefore, refused to enter the credit, but, as his duty was ministerial, the Court issued the mandamus. Would it have been any the less the duty of the successor of Mr. Kendall to have entered the credit, or any the less the duty of the Court to have issued the mandamus, had Mr. Kendall retired from office immediately after his refusal? The ministerial duty was not that of Mr. Kendall alone, but that of any incumbent of the office. In *Decatur* vs. *Paulding*, 14 Peters', 497, the Court decided that, as the duty was discretionary, a successor could not re-open the case to set aside his predecessor's rightly-exercised discretionary judgment, but Mr. Justice Baldwin,[1] page 602, points out that this cannot apply when the duty is ministerial: "Change of officers who have the disbursement of the pension fund can have no effect on the right of the relator; a refusal by the predecessor of the present incumbent is no legal cause for his refusal to do the act required, had it been enjoined by law, *it can be considered only as a repeated refusal of successive applications, having the same effect, as if made to himself to perform the same ministerial act*, which it would have been the duty of either to perform if the right claimed had existed, but as it did not exist the refusal was justifiable." The above italics are introduced to draw attention to the applicability of the words to the case of the plaintiff in error; the latter never abandoned his claim, and in the midst of his repeated applications, to have the law correctly construed by Mr. Maynard, the latter is promoted to an

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(1) Mr. Justice Baldwin, whilst agreeing with the Court that Mrs. Decatur was not entitled to both pensions, yet dissented from the opinion. The chief point of difference, however, was a question of jurisdiction, but what Mr. Justice Baldwin says, quoted in the text, is not antagonistic to anything in the opinion.

Assistant Secretaryship of the Treasury, and thus by the theory of the defendants in error, by reason of this mere change in office, the vested right of the plaintiff in error is extinguished. So, in *Hollon Parker, petitioner*, 131 U. S., 221, a practically similar principle is applied.

The defendants in error admit that they will reopen a case decided by their predecessor in office, where an error in fact has been made, but they maintain that their determination not to reopen a case where a clearly erroneous construction of the law has been made by their predecessor, is in itself an act of executive discretion, and therefore cannot be coerced. To maintain this position would be to hold, that an erroneous construction of a ministerial act by a predecessor would change what was a ministerial duty for him into a discretionary duty for a successor, and permit the latter, under the plea of discretion, to decline to carry out the law. This very contention of the change of a duty from ministerial to discretionary was urged in U. S., *Ex rel., Hoe* vs *Butterworth*, 3 Mac., 229, 282, '86, but the Court replied, p. 286: "No executive discretion to deny his duty, either directly or by circuity." Here, the question was as to the power of the Commissioner of Patents over his own action, but *Craig* vs. *Leitensdorfer*, 123 U. S., 189, 208, 214, went a step further, involving the power of a present incumbent of an office over his predecessor's action. This is the exact question in the present case. The facts were these: the President decided that the Act did not authorize an appeal to the Commissioner of the General Land Office, and he, therefore, ordered the land warrant to be issued; the Secretary of the Interior held that he also was bound to hold that an appeal did not lie, by reason of the construction of the Act to that effect, by the President; the succeeding Secretary held, as his predecessor in office, had decided that an appeal did not lie, he was precluded from considering the point. Now, here was an erroneous con-

struction, depriving an individual of a legal right by a change of the incumbent of an office, and the Court held, in effect, if the President misconstrued the Act, then the Secretary, by accepting this misconstruction, also misconstrued the Act, both misconstructions were illegal and, therefore, void; they were and are of no force and efficacy, and the question of whether an appeal did or did not exist was one of law, about which there was no discretion, and a previous erroneous decision on this point was not binding upon any succeeding incumbent of the offices of the General Land Office or the Secretary of the Interior; and *if the right of appeal was a legal right existing by the Act, a mandamus would issue to compel the successor to entertain it.* What could be more applicable than the above words to the case of the plaintiff in error; they are really conclusive—if the right to ten cents per mile is a legal right, existing by the Act, a mandamus will issue to compel a successor to allow that amount.

The Commissioner of Pensions is almost every day, overruling his predecessor's construction of the law. Again, U. S. *ex rel, Miller* vs. *Black*, 128 U. S. 40, was sent back to the Court below, in order that a rule to show cause might issue, but before the rule issued, Commissioner Black had been succeeded by Commissioner Raum, and the case became U. S. *ex rel, Miller* vs. *Raum*, 135 U. S. 200. Raum made answer, but he did not demur and allege as a matter of law, that he could not re-open the case, because it had been rejected by his predecessor. The change in the office of Commissioner of Pensions could not affect the right of Miller to an increase in pension, if he had been entitled to it.

(5.) MANDAMUS IS THE APPROPRIATE REMEDY TO COMPEL THE PAYMENT OF MILEAGE FIXED BY LAW.

In *Nichols* v. *Comptroller*, 4 Stew. & Pa. Ala., 154, the Court held: "In all such cases it is the duty of the

Comptroller to grant the warrant. No suit or judgment against the State could better ascertain the amount due or confer a better right than an appropriation already made by law." And, again, in *State ex rel. State Bank* vs. *Hastings*, 15 Wis, 75, 79, the Court held: There need not be a question of any other remedy, for it is the duty of the Comptroller to pay over a salary, governed by law, to the party entitled to the same.

It has been proven that this case is not a suit against the State, (see p. 8). Why should a suit be brought against the United States? She intends this mileage act to be properly construed. It was no fault of hers that the act was not properly interpreted. She has not violated her agreement, then why should she be sued? Mr. Justice Mathews in *Poindexter* vs. *Greenhow*, *supra*, presents this principle very clearly: "the plaintiff in error, in fact and in law is representing her [the State], as he seeks to establish her law and vindicates her integrity, as he maintains his own right." The accounting officers have acted directly contrary to the commands of the United States, then why should the latter be sued?

The proper remedy of a Judge for his salary is mandamus. Why? Because he has a legal right to a certain fixed sum. The mandamus is the proper remedy, and a suit in the Court of Claims is not, because the money is appropriated by the act and the plaintiff in error has an already existing legal right to the money, which the United States wants him to receive, and which he has not received only by reason of the illegal personal action of the accounting officers. But a suit in the Court of Claims is antagonistic to the United States, and even if successful, the right to the money is still inchoate, for it is dependent upon the will of Congress to appropriate the amount awarded by the Court, whilst in the mandamus, the money is already appropriated and the legal right to it is already existing.

(6.) Jurisdiction.

The Act of Congress of March 3, 1885 [23 Stat. L. 443], provides for a writ of error from this Court to the Supreme Court of the District of Columbia, the second section providing that "the preceding section [fixing the amount] shall not apply to any case . . . in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases, an appeal or writ of error may be brought without regard to the sum or value in dispute."

It is submitted that the present case falls within the second section. The jurisdiction arises in this way: if we have succeeded in showing that the duty is ministerial, and that the exercise of a discretion is an invalid exercise of an authority under the United States, as alleged in the petition [Record, p. 1, 4th par.], and assigned as an error in the Assignment of Errors [Record, p. 7], then it follows that jurisdiction attaches, because the accounting officers show by what they have done, that they consider their duty as discretionary, and the Court below, by the dismissal of the petition, decided in favor of the accounting officers. As just said, if we have succeeded in establishing that the duty is ministerial, then, of course, in exercising a discretion, the accounting officers exceeded their authority, and the validity of an authority exercised under the United States is drawn in question. In other words, the accounting officer had no authority to exercise a discretion; but as they did exercise it, the authority they exercised is unsupported by the law, and invalid.

The meaning of the words "the validity of an authority," etc., etc., can be gathered from the following statements:

1. The authority, whether given by Legislative Act or otherwise, must be a valid authority—that is, the grantor must have the right to give the authority to the grantee.

Clough vs. *Curtis*, 10 S. C. Rep., No. 22, p. 573.

2. The act performed under the authority must be authorized by the Act giving the authority. Of course, if an officer of the Government does something which the Act defining his authority does not authorize him to do, then the validity of his authority is involved.

Clayton vs. *Utah Territory*, 132 U. S., 632.
Neilson vs. *Logow*, 7 How., 775.

This second statement controls the case of the plaintiff in error, for, as Mr. Justice MILLER, in *Clayton* vs. *Utah Territory*, 132 U. S., 637, 638, referring to the meaning of this clause, said: "This second section is based upon the same general principle which is found in the Act of Congress allowing writs of error from this Court to the highest Court of a State, namely, to protect parties against the exercise of an unlawful power on the part of the State authorities." What could be a more unlawful exercise of power than for the accounting officers—by a false construction—to deprive an individual of a legal right given him by an Act of Congress, and with the creation of which legal right the accounting officers had nothing in the world to do?

The adjudications upon this clause of the statute have not been numerous, but an examination of two cases, wherein this Court held that it had not jurisdiction, will illustrate more thoroughly the point involved in the present case; thus, it is not claimed:

1. That the construction of a statute by a Court of the United States, involves the validity of an authority, etc., etc., as was urged in *Snow* vs. *U. S.*, 118 U. S., 346.

2. That the extent of an authority—under a statute of the United States, as construed by a Court of the United States, involves the validity of a statute or of an authority, etc., etc., as was urged in *Baltimore and Potomac Ry. Co.* vs. *Hopkins*, 130 U. S., 210, 223, 225.

It is submitted that the present case presents a totally different question. The Court below, by sustaining the

demurrer, upheld the authority of the accounting officers in their exercise of a discretionary power over a mandatory Act—the validity of such discretion being denied in the fourth paragraph of the petition [Record, p. 1], and assigned as the third error in the Assignment of Errors [Record, p. 7].

In *Baltimore and Potomac Railway Co.* vs. *Hopkins, supra*, the Court said: "The distinction between the construction of a statute or the extent of an authority, and the validity of a statute or of an authority, had been frequently pointed out." The plaintiff in error does not urge that the Court below erred in the construction of a statute, as in *Snow* vs. *U. S., supra*, nor in *the extent* of an authority, in the sense in which those words are used in the case just quoted; but he does urge, most strenuously, that the validity of the authority of the accounting officers has been brought in question; the extent of their authority, not in the sense as used in the case above quoted, but in the sense as to whether they had the authority to do what they did, in other words, the extent of their jurisdiction. If the accounting officers exceeded their authority they exceeded their jurisdiction, and the validity of their authority is called in question, and is subject to review in the Court. This is admitted in *Snow* vs. *U. S., supra*, where the Court says: "The validity of the jurisdiction over the crime and over the person were not drawn in question," and again, in *Baltimore and Potomac Railway Co.* vs. *Hopkins, supra:* "The case does not involve the exercise of an authority under the United States, in the sense of an authority to act for the government."

Chief Justice Marshall, in *ex parte Randolph*, 2 Brock., 447, 479, 480, in speaking of executive officers and what constitutes the validity of their acts, said: "Agents (executive officers) are purely ministerial, and their acts are necessarily to be treated only as ministerial acts. The inevitable consequence is that *their validity* must be decided by those legal principles which govern all acts of this char-

acter. These require that the authority, whether given by a legislative act or otherwise, must be strictly pursued. Such agents cannot act on other persons or other subjects than those marked out in the power, nor can they proceed in a manner different from that it prescribes."

Now, although the proceedings before the accounting officers may be *due process of law*—under *Murray's Lessee* vs. *Hoboken*, etc., 18 How. 272, and *Hartado* vs. *Cal.*, 110 U. S. 516—yet it follows from the above words of Marshall that the proceedings are not judicial but ministerial ones; that is, the accounting officers must do exactly what the Act, prescribing their duties, calls upon them to do, and the question in each case is—whether their duty, under this ministerial process, is a discretionary (*quasi-judicial*) or a ministerial duty, and the test as already stated, is as follows: If the Act, which the accounting officers are to apply to the case, gives the beneficiary a legal right, then their duty is ministerial to see that he gets that right. This must be the true principle, for when the Act creates this legal right, then the fact that the accounting officers are ministerial officers, and nothing but that, goes to show, that unless the Act is strictly pursued, the ministerial process has not been carried out. But where the Act does not create a legal right, but the creation of that right is left to the discretion of the accounting officers, for instance, as in *U. S.* vs. *McLean*, 95 U. S. 750, then the process is still ministerial, but it is strictly carried out by the accounting officers, exercising their discretion. Hence, in the case of plaintiff in error, the mileage Act creates a legal right, and the "due process of law," as it should be followed by these ministerial officers, must consist in giving that legal right; if this is not done, then the validity of their authority is called in question, and the "*due process of law*" has not been carried out.

The plaintiff in errors submits that the Court below was in error in dismissing the petition.

R. MASON LISLE,
J. EDWARD CARPENTER,
For Plaintiff in Error.

Supreme Court of the United States.

October Term, 1890. No. 1195.

UNITED STATES *ex rel.* R. MASON LISLE,
Plaintiff in Error.

vs.

JOHN R. LYNCH AND B. F. GILKESON,
Defendants in Error.

Motion for Reargument.

Now comes the plaintiff in error and moves the Court to grant a reargument in the above-entitled cause, and to fix a hearing, on the earliest day practicable.

This motion is made, for the reason, that the Court has erred in law, as to the duties of the Accounting Officers in this cause.

In its opinion, the Court say: (1) "The validity of an authority is drawn in question, when the * * * constitutionality or legality of such * * * authority is denied, and the denial forms the subject of direct inquiry," and (2), "We think that the authority of the Second Comptroller and the Fourth Auditor is not thus denied here, nor the validity of that authority questioned,

but that what is claimed is that in the exercise of a *valid* (the italics are mine) authority, the Auditor and Comptroller erred in respect to an allowance, in view of the decision of this Court in another case."

In the first of the above quotations, the Court states under what circumstances, the validity of an authority is drawn in question, and in the second, it shows, as it understood the argument of the plaintiff in error, that what was claimed, did not fall within the principle just announced.

As a matter of fact, the plaintiff in error, in his brief and in his oral argument, recognized from the previous decisions of the Court, in *U. S.* vs. *Snow*, 118 U. S., 353, and in *Balt. and Pot. R. R.* vs. *Hopkins*, 130 U. S., 210, the principle stated above, in the first quotation, and more than this, it was this very principle upon which he relied, in urging that the Court had jurisdiction. But in the second quotation from its opinion, given above, the Court is clearly mistaken, in that to which it insists the claim of the plaintiff in error, must be confined under the above principle.

It was not and it could not be claimed, even by the Court, in fact, it was distinctly denied: "That in the exercise of a valid authority, the Auditor and Comptroller erred in respect to an allowance, in view of the decision of this Court in another case." This was not the claim at all, but what was urged was this: that the offices of Comptroller and Auditor were *validly* created offices, was admitted, but it was contended that what they did *under the Acts, prescribing their duties* was *invalid.* The course of reasoning in support of this view was as follows: the whole theory of the duties of the Comptroller and Auditor is that they have jurisdiction of accounts accruing in the Navy Department, but where the claim is for a statutory fixed amount, their jurisdiction extends only so for as to protect the Government; to see that Congress has passed the Act which grants the fixed

amount; to see that the vouchers are correct, that the service was performed, that the distance and the amount are correctly computed, and, finally, to see that the identity of the claimant is established—*all of which facts were admitted by the Accounting Officers;* but over this statutory fixed amount, they had no jurisdiction whatsoever. This statutory fixed amount is a legal right of the claimant with which it is absolutely and positively beyond their jurisdiction to interfere, and their duty is confined solely to issuing a warrant for the amount and, if they curtail or alter this statutory amount in any way whatsoever, *they arrogate to themselves legislative powers.* Their jurisdiction, in a case of this character is merely a jurisdiction for the protection of the Treasury Department, in its accounts with the United States for the issuing of the warrant—its only purpose is to show, in the Treasury Returns, that the said statutory amount had been paid out by the proper warrant; but this jurisdiction has nothing to do with the legal right to the statutory amount, given the plaintiff in error, by an Act of Congress.

This principle is supported by the unanimous opinion of this Court at its last term, in *U. S.* vs. *Waters,* 133 U. S., 208, 213, 214. In order to reach the conclusion in the principal case, that the validity of the authority exercised by the accounting officers was *not* drawn in question, "an opposite view is announced, and it is for this reason that a motion is made for a re-argument, that the different principles may be clearly placed before the Court, they are presented below in parallel columns. It is immaterial in principle that the character of these causes was different, for in each was brought in question the nature of the duties of the accounting officers. It was necessary to define these duties, in order to reach a decision in each cause, and it is not possible that the same principle can be assumed as establishing different premises, in order to reach different conclusions.

U. S. ex rel. Lisle vs. *Lynch.*

"Considering the accepted definition of an auditor with the language used in these provisions, the fourth auditor may be correctly said to be authorized to examine accounts accruing in the Navy Department, compare the items with the vouchers, *allow or reject charges* (the italics are mine), and state the balances, and the Comptroller has authority to revise the action of the Auditor, and certify the balances found by him." The above principle, together with Sec. 236 Revised Statutes (considered later on p. 6), formed the basis of the argument for the dismissal of the writ of error.

U. S. vs. *Waters*, 133 *U.S.*, 213, 214.

"The powers and duties of the accounting officers are well described by the Court below in the following language, with which we agree:"

"Those powers and duties are well understood. The Auditor merely examines and audits accounts, *neither allowing or disallowing the same* (the italics are mine), certifies balances and transmits the same to the Comptroller for his decision thereon. The Comptroller decides whether or not the items are authorized by statute, and are legally chargeable *he has no power to review, revise and alter items expressly allowed by statute*" (the italics are mine). Attorney General Johnson in advising the Secretary of the Treasury as to the duties of the accounting officers, 5 Opp. Attorney-General, 196, said: "Now, whether in the discharge of their separate functions, the Auditor, Comptroller or Secretary acts in a particular case, *judicially*, depends upon *the character of the claim.* It it is for a certain fixed sum given by Act of Congress to the claimant, *nothing but the existence of the act and the identity of the claimant is to be inquired into. Over the amount due the officers have no*

jurisdiction" (the italics are mine). And again, in a later opinion in the same volume, 5 Opp. 644, Attorney-General Crittenden said: "If Congress by law allows a specific sum to the claimant, to be paid out of money in the Treasury not otherwise appropriated, yet the claimant *must* present his claim under the Act of Congress [Act of 1817] to the Auditor, who *must* receive and allow it, certify the allowance to the Comptroller, who *must* adjust it, and certify such adjustment to the Register, who *must* certify a copy of said balance, so adjusted, to the Secretary of the Treasury, who thereupon *must* grant a warrant for the said sum certified according to the Act of Congress." (The italics are mine.) That is to say, these opinions show that one must go to the Treasury for the money, and that the accounting officers exercise no jurisdiction over the amount, that they act for the United States simply as a PAYING TELLER ACTS FOR A BANK, the statutory amount is before them, and their duties are confined, their jurisdiction extends no further than to seeing that the facts in the case are correct. The paying teller before paying a check, and the accounting officers—where the amount is fixed,—equally see if there is a credit to the account. In the case of the accounting officers, the credit arises from the existance of the Act, the performance of the journey, the correct computation of distance and miles, and the vouchers; these credits must all be corrct, else the statutory amount cannot be allowed.

It cannot but be admitted that the principle announced above, in the principal case, is directly opposed to the one announced in *U. S.* vs. *Waters*, *supra*, and to the opinions of Attorneys General Johnson and Crittenden, quoted above, and hence the question is, which is the true principle? It is submitted that that announced in *U. S.* vs. *Waters*, *supra*, and urged in the brief of the plaintiff in error and repeated in this argument, must be correct. Attorney General Johnson in the opinion just quoted,

advised the Secretary of the Treasury that, where the Act of Congress authorized the Secretary of the Senate to fix the amount due, and this Court held in *U. S.* vs. *Waters* that where the Act authorized the Court to fix the compensation, that the Comptroller had no authority in the matter. Why? Because in each case an Act of Congress authorized the sum to be fixed in some other way. In the former case the Secretary of the Senate was to fix the amount due; in the *Waters case* the Court was to fix the compensation, but in both cases the point is, that the duty of the Comptroller in each case was to pass the amount allowed by the law, no matter how it was established and as Congress can authorize the Secretary of the Senate or the Court to fix the amount, of course it can equally fix the amount itself, and this is what was done by Congress in the case of the plaintiff in error.

It should be stated that by the provisions of Section 236, Revised Statutes, quoted by the Court, it is required that all claims and demands against the United States shall be settled in the Treasury, but it must be observed that this section is Section 2 of the Act of March 3, 1817 (3 Stat. L., 366), and by the said Act it will be seen that Section 3 creates one additional Comptroller and four additional Auditors, for the more speedy settlement of public accounts. In fact the Act is entitled, "An Act to provide for the prompt settlement of public accounts." It is submitted that the object of this Act was to consolidate in the Treasury all the monetary matters of the United States—Section 1, abolishing the office of Accountant of the Navy. This Act in no way enlarged the powers of the accounting officers. It in no way affected the character of their duties which have always been, as announced in *U. S.* vs. *Waters*, and the only influence of the Act upon a case like that of the plaintiff in error is, that formerly the statutory amount would have been allowed by the Accountant of the Navy, whilst after the Act it was to be allowed by the proper Auditor and Comptroller of the Treasury Department.

THE COURT say:

"*The denial of the validity of the authority must form the subject of direct inquiry.*"

In *Neilson* vs. *Lagow*, 7 How., 772, 775, the denial of the validity of the authority of the Secretary of the Treasury formed the subject of direct inquiry, because he purchased land for the United States, whilst his authority to do so had been taken away from him by Act of Congress; here the validity of the authority which the Secretary exercised, depended, of course, directly upon the Act which controlled the matter in the premises. Now, the point is exactly similar in the principal case—the validity of the Secretary's act depended upon his authority to act in a certain way under a certain Act of Congress; the validity of the Accounting Officers' act depends upon their authority to act—*not, solely,* under the Acts prescribing their duties, *but* under those Acts, taken in connection with the duty placed upon them by the mileage Act; or, in other words, as said by Mr. Attorney General Johnson, *supra:* "whether in the discharge of their functions, the Auditor, Comptroller or Secretary acts in a particular case, judicially, depends upon *the character of the claim,* if it is for a fixed sum given by the of Congress * * * over the amount due, the officers *have no jurisdiction.*" In *Neilson* vs. *Lagow*, the Judiciary Act required that the decision should be *against* the validity, but in the Act of 1885, there is no such provision; as a matter of fact, the complaint is that the decision was in favor of the validity of the authority exercised. By reference to the petition (Record, p. 1), it will be seen that, in the paragraph immediately following the fourth, the sections of the Revised Statutes, prescribing the duties of the Accounting Officers and the mileage Act are all cited, and the denial of the validity of the authority exercised is directly drawn in question and is made the distinct issue, and this was done with the express object of drawing in question the

validity of the authority, in order to establish a right of review in this Court.

It is said by the Court, in the principal case: "that what is claimed is that * * * the Auditor and Comptroller erred in respect to an allowance, *in view of the decision of this Court in another case*" (the italics are mine).

By reference to the brief of the plaintiff in error, p. 4, it will be seen that the *Graham case* is cited, solely for the purpose of showing the true construction of the mileage Act, thus avoiding the necessity of taking up the time of the Court to establish what had already been decided, to wit, that ten cents per mile was a legal right of the plaintiff in error. The legal right existed independently of the *Graham* case. It was said several times in the argument that the case was in no way cited as a reason for issuing the mandamus, and it was also stated that it was in no way binding upon the Accounting Officers, and it was cited *only*, to show that the mileage Act did give the individual a legal right to a statutory amount, and thus the plaintiff in error established one element requisite to the issuing of the mandamus. In so far as regards the the authority for the writ, the *Kendall case* was alone relied upon, and the distinct difference between that case and the principal case, and, the *Decatur case* and the *Dunlap case* was pointed out, and, the words of Mr. Justice Thompson in the *Kendall case*, 12 Peters, 610, this case being approved in both the *Decatur case* and the *Dunlap case*, were cited in the argument: "it would be an alarming doctrine if Congress could not place any duty upon executive officers." Congress did place the duty of allowing ten cents per mile upon the Accounting Officers, and mandamus should issue to compel them to carry out the law.

In addition to what I have already said, which agrees with the recited opinions of Attorneys-General Johnson and Crittenden, the opinion of this Court in the

Waters case may also be sustained upon the following general principle (also presented in brief of plaintiff, p. 19), which is probably the one which guided the Court to its decision in that case; in the *Sinking Fund cases*, 99 *U. S.*, 700, it is held that the United States, equally with the States, are prohibited from depriving persons of property without "*due process of law.*" This principle is sustained, both in the opinion and in the opinions of the dissenting Justices—the only point of difference being that the majority of the Justices thought that the Act of Congress of 1878 did not, whilst the dissenting Justices thought that it did, deprive the corporation of its property without "*due process of law.*" It thus being clear that the United States cannot deprive a person of property without "*due process of law,*" the question remains, has it not done so, if the duties placed upon the Auditor and Comptroller by the Court in the principal case, announces the correct principle, rather than *U. S.* vs. *Waters?* It cannot be denied that the Mileage Act —all the facts in the case being admitted—gave the claimant a legal right to ten cents per mile. *Rutherford* vs. *Greene's Heirs*, 2 Wheat, 196, 198, decides this point; then how is it possible for Congress to give the Accounting Officers, in the Acts prescribing their duties, a valid authority to deprive the claimant of his property? Congress could not do this, but the decision in the principal case—defining the duties of the Accounting Officers—holds that Congress has done this very thing, whilst the decision in the *Waters case*, considering the same statutes prescribing the duties of the Accounting Officers, decided that these statutes could not be construed as granting such legislative powers to those officers. And this latter decision is correct, for no matter how far the Court has gone in explaining the meaning of the words "*due process of law,*" it is clearly not "*due process of law*" for Accounting Officers to arrogate to themselves *legislative* powers to cut down a *legislative* grant of a fixed sum. If the decision in

the principal case is correct, rather than the one in the *Waters case*, as to the duties of the Accounting Officers, then the Acts of Congress giving those officers such authority are, *per se*, invalid Acts, being *unconstitutional;* if the decision in the *Waters case* is correct, that the Accounting Officers had "*no power to review, revise and alter items expressly allowed by statute*," then it follows, as they unquestionably did exercise the power denied them, the validity of the power exercised is drawn in question; thus, it would seem, that the writ of error should not have been dismissed for want of jurisdiction, because, in either event, the case falls within the principle announced, 'that the validity of an authority is drawn in question when the constitutionality or legality of such authority is denied," for if the Acts creating the offices of the Accounting Officers, gave them the authority asserted, in the principal case, then the said acts are *unconstitutional;* but if, on the contrary, the *Waters case* correctly defines the duties of those officers, then the *legality* of the authority exercised is drawn in question, so, in either event, in the one case, the *constitutionality*, and in the other case, the *legality* of the authority, is drawn in question.

In conclusion, it may be said, as the points are referred to, in the closing paragraph of the opinion, that the reasons why suit should not have been brought in the Court of Claims, are stated in the brief, pp. 8, 9, 10 and 15, and again, the petition for the mandamus (Record, p. 2, par. 2) shows that the claim was adjusted on the basis of the *overland* route, instead of by the route ordered to be taken. The brief of the defendants in error. pp. 2 and 5 admits that this was arbitrarily done. In the rule to show cause, it was the duty of the defendants in error to show to the Court, as the subject matter was of record and was the department's information, any reason contrary to that alleged in the petition, but it was impossible to allege any reason for dismissing the claim other than that an error had been made in construing the mileage Act.

They had nothing to justify their action, hence, they demurred, trusting to their invalid exercise of authority being sustained on technical grounds. They could not have done anything else than demur, for in the whole action of the Treasury Department there was nothing of record, either of predecessor or successor, which would have justified the rejection of the claim; in fact there was no reason save it was rejected, by reason of a misconstruction of the law, and paragraph *two* and paragraph *four* of the petition should be taken together, as establishing the fact that it was so rejected by Comptroller Maynard. The object of mentioning Comptroller Maynard, in paragraph *four*, was to show that the predecessor of the defendants in error had rejected the claim, and the fact that he did so for a misconstruction of the law is asserted in paragraph *two*.

The plaintiff in error therefore prays that this motion be allowed.

R. MASON LISLE,

Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES *ex rel.* R. MASON LISLE, plaintiff in error,
vs.
JOHN R. LYNCH, FOURTH AUDITOR, and BENJAMIN F. GILKESON, Second Comptroller of the Treasury of the United States. } No. 1195.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANTS.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

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IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANTS.

STATEMENT OF THE CASE.

It appears that on March 19, 1872, the relator, who was a lieutenant in the United States Navy,

"was ordered *by his superior officer* to proceed from Philadelphia, Pa., via New York and the Pacific mail steamer from New York, on March 30, to Aspinwall, across the Isthmus of Panama, and thence to the navy-yard, Mare Island, California, and report for duty on board the U. S. S. "*Lackawanna.*" He proceeded by the said route, in accordance with said orders, completing the journey on May 6, 1872.

He traveled 6,222 miles, and claimed $613.40 as mileage, but was allowed only $324.80, in addition to the sum of $8.80 allowed as mileage from Philadelphia to New York. This amount of $324.80 was calculated on the basis of 3,248 miles, the distance *overland* from New York to Mare Island. The relator accordingly claims the sum of $288.60 as still due, and asks that the defendants, the Fourth Auditor and Second Comptroller of the Treasury, may be compelled by mandamus to audit and allow the relator's account, and issue a warrant for its payment. (R, pp. 1, 2.)

It further appears that before the defendants were appointed to office the relator's claim had

been "adjusted and disallowed by Comptroller Maynard."

The defendants demurred to the petition (R., p. 4).

The questions presented arise under the following provision of section 2 of the act of Congress of March 3, 1835 (4 Stat., 757):

> It is hereby expressly declared that the yearly allowance provided in this act is all the pay, compensation, and allowance that shall be received, under any circumstances whatever, by any such officer or person, except for travelling expenses when under orders, for which ten cents per mile shall be allowed.

The accounting officers held that this law did not authorize payment of mileage for the circuitous route traveled by the relator, but only for the distance covered by the direct overland route between the points of departure and destination. The relator differed from them in this view of the law, and he asks this court to overrule their decision and compel them to allow what he claims.

ARGUMENT.

I.

There does not appear to be anything in the relator's brief to distinguish his case from the

long line of decisions of this court refusing to take from the hands of the political department of the Government the administration of matters properly belonging to that department.

One of the latest of those decisions was in United States *ex rel.* Dunlap *v.* Black (128 U. S., 41). In that case the relator came before this court with the usual complaint that an executive officer, the Commissioner of Pensions, had trampled under foot an act of Congress, the meaning of which was perfectly plain and beyond all question, and which contained a provision for the relator's benefit.

In disposing of the case the previous rulings of the court were instructively reviewed, and the proposition again laid down that this court will not control the interpretation put on a statute by an executive officer whose duty it is to apply that statute to its subject-matter. Referring to the facts of the case then in hand, the court said that the Commissioner of Pensions and the Secretary of the Interior had adopted an interpretation of the law adverse to the relator, but that it was "*of no consequence in the decision of*

this case" whether that interpretation was correct or not, as the court had no power to review it.

That case was identical in principle with Decatur *v.* Paulding (14 Pet., 497), where the danger of judicial interference with executive administration is clearly pointed out.

In this case, as in those cited above, the relator's contention is that the statute regulating mileage is too plain for dispute, and admits of no meaning but the one favorable to him. But that is the very question which this court has time and again declared it will not decide, because it has no reviewing power in such cases. Consequently, such a question has no relevancy to a case of mandamus.

It is not pretended that the accounting officers, whose action is complained of, have been guilty of bad faith; the head and front of their offending is that they *did not agree with the relator as to the meaning of the law.* That is the whole case.

The act of Congress regulating mileage calls for executive administration. The relator is dissatisfied with executive administration of the act

and wants this court to give him *judicial administration* in its place.

The accounting officers have not refused to administer the law, but have decided that Congress, in allowing mileage, meant that the basis of its computation should be a direct route between the points of departure and destination and not an unnecessarily circuitous one. Can this court substitute a different view of the law for this one without overturning what it has settled over and over again? This court has said that in mandamus it will not go into the question of interpretation *at all*, even where it sees that the executive department of the Government has put a meaning on a law which its words do not warrant, and which the court would reject in a proper case.

The present case is not one where Congress has ordered a definite sum of money to be paid, thereby requiring the performance of a purely ministerial act. Congress has, it is true, directed mileage to be paid at the rate of ten cents a mile, but it is equally true that Congress has left to

implication the basis on which the mileage allowed is to be computed, and, in applying the law, that implication is to be supplied by the executive department and not the judicial.

If this court were to heed the disappointed claimants on the National Treasury that come before it for the writ of mandamus, it would not be long before the executive department of the Government would be merged in the judicial as to some of its great powers, and a radical change brought about in the scheme of government established by the Constitution.

II.

There is another ground on which the judgment of the court below may be sustained.

When the relator brought his claim before the defendants for audit and allowance it was *res judicata.* It had been passed upon and disallowed during the previous administration by Second Comptroller Maynard, and had passed beyond the jurisdiction of the executive department of the Government. Congress or the

Court of Claims could alone inquire into the merits of the claim.

The rule that what has once been settled by an Executive Department will not be re-opened, except upon grounds analogous to those on which courts grant new trials and rehearings, has been adhered to with firmness. The enforcement of this principle is intimately connected with the dispatch of the public business, and has been upheld by some of the ablest Attorneys-General.

Thus we find Attorney-General Black giving it his emphatic sanction in 9 Opinions, p. 34. He says:

> Is this a matter for you to decide, or is it already settled? If it has been once heard and determined by the proper officer, there can be no propriety in opening it anew. This rule is well settled, and ought to be strictly adhered to. There must be an end at some time or another even of a claim against the Government. *Interest reipublicæ, ut sit finis litium* is a maxim as applicable to public creditors, urging their claims upon an executive department, as to any other class of litigants. It is not only the public interest, but a public necessity, that one fair hearing and one deliberate judgment on a question of this kind should preclude all further inquiry. Let us see, then, if the subject-matter of the present claim has been already adjudicated.

Attorney-General Hoar says in 13 Opinions, p. 35, as follows:

> Under these circumstances, I am of opinion that the deliberate decision of a former administration, of a question involv-

> ing private rights and interests, can not with propriety be reconsidered by its successors. No new facts are shown to exist which were not known when that decision was made. Ample opportunity has occurred for Congress, by a new provision of law, or by a declaratory act, to establish authoritatively the struction of the statute.
>
> It was said by Mr. Wirt "to be a rule of action prescribed to itself by each administration, to consider the acts of its predecessors conclusive as far as the Executive is concerned." (1 Opins.,9.) An adherence to this rule, which has been often restated by this Department, I consider as of great importance. Without it there would seem to be no end to the number of times in which a question might be presented for reconsideration.

In harmony with these are the opinions of Mr. Wirt, Mr. Taney, Mr. Nelson, Mr. Toucey, Mr. Johnson, and Mr. Stanbery, as will be found on reference to their opinions, which are all cited in 13 Opinions, 388.

The doctrine thus established had the full recognition of this court in United States *v.* Bank of the Metropolis (15 Pet., 401), where the court says:

> This right of an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced.

It is not pretended that the relator's claim was laid before defendants upon a different state of facts from that on which Comptroller Maynard acted.